No. 84-1667

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; and GERALD E. HOSMAN,
Petitioners,

vs.

MATTHEW N. FRASER, a Minor, and E.L. FRASER as his Guardian Ad Litem,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE STUDENT PRESS LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

A. Main Question:

Based upon the facts found by the district court and other evidence in the record, did the Court of Appeals correctly conclude that there is no basis for reversing the decision of the district court?

B. Subsidiary Questions:

(1) Is it violative of the First Amendment for a public [secondary] school district to punish a student for uttering otherwise protected speech in a public forum?

(2) Is the School District's Disruptive Conduct Rule which fails to define key terms unconstitutionally vague and overbroad on its face under the First and Fourteenth Amendments?

(3) Is the School District's Disruptive Conduct Rule unconstitutional as applied when a student is punished for speech which is not obscene but merely includes "sexual innuendo," thus violating the student's right of due process under the Fourteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae Student Press Law Center is submitted to the Court with the consent of the parties to the case, and their letters of consent will be filed with the Clerk of the Court.

The Student Press Law Center is a national, non-profit, incorporated, legal research, information and advocacy organization formed for the purpose of promoting and preserving the First and Fourteenth Amendment rights of high school and college journalists. The Center's board of directors includes representatives of the major national organizations of high school journalism teachers and students such as Journalism Education Association, National Scholastic Press Association, Quill and Scroll Society, Columbia Scholastic Press Association and Columbia Scholastic Press Advisers Association. While the main focus of the Student Press Law Center is freedom of the press, in the years since the organization's founding in 1974, the Center has recognized that all aspects of student freedom of speech are closely linked and has supported student expression outside the student media. To those ends, the Student Press Law Center has collected information on student speech cases around the country, submitted numerous *amicus* briefs, most recently in *Kuhlmeier* v. *Hazelwood School District*, 607 F. Supp. 1450 (E.D. Mo.), *appeal docketed*, No. 85-1614EM (8th Cir. 1985), and *Solmitz* v. *Maine School Administrative District No. 59*, 495 A.2d 812 (Me. 1985), and litigated two student First Amendment Cases: *Williams* v. *Spencer*, 622 F.2d 1200 (4th Cir. 1980), and *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731

(E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977).

The Student Press Law Center finds that in learning the responsibilities of democracy, students in many high schools face a common problem: the difficult task of speaking out and being heard despite the opposition of their school administrators. Because of the impact this litigation will have on high schools across the nation, and because the Student Press Law Center is the nation's only organization devoted solely to protecting student First Amendment rights, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

In April 1983, Respondent, Matthew Fraser ("Fraser"), was a senior at Bethel High School, a public school in Washington State run by Petitioner, Bethel School District No. 403. At an attendance-voluntary assembly held prior to elections for student body officers, Fraser delivered the following speech on behalf of a vice-presidential candidate:

> I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds.
>
> Jeff is a man who will go to the very end, even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

Fraser used puns and double entendres as rhetorical tools. He was successful; his candidate was elected to office with a sizable majority.

Shortly thereafter, Fraser was suspended for three days as a direct result of his address, and served two days of that suspension. His name was removed from the ballot for graduation speaker. The record

indicates that other students had not been punished for similar acts in the past.

In *Fraser* v. *Bethel School District No. 403*, No. C83-306T (W.D. Wash. June 8, 1983) (unreported), the United States District Court for the Western District of Washington ruled totally in Fraser's favor, finding a violation of his First Amendment rights and his rights under state law. The court further held that the school's disciplinary rules were unconstitutionally vague and overbroad, and that defendant school district's conduct violated Fraser's due process rights under the Fourteenth Amendment to the United States Constitution. An appeal ensued and the judgment was affirmed by the United States Court of Appeals for the Ninth Circuit. 755 F.2d 1356 (9th Cir. 1985). The case is before this Court on writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The School District violated Fraser's rights under the First and Fourteenth Amendments to the Constitution when it punished him for delivering to a forum for public expression a political speech which contained no language falling outside the realm of protected communication.

It is clear that the assembly at which Fraser spoke was a public forum: it was organized by students for the purpose of disseminating information about candidates in an upcoming election. The District had no authority to regulate speech in the forum, nor to punish such speech after the event. The fact that the speech took place in school does not work to deprive Fraser of his rights, and the District has shown neither the need to restrict speech nor the requisite conditions for such a restriction in the instant case.

The District has further overstepped the bounds of constitutionally permissible behavior by attempting to enforce a rule regulating disruptive conduct which fails to conform to legal requirements. The regulation in question fails to define key terms, is overbroad and vague, and attempts to carve out an entirely new realm of unprotected speech -- non-obscene innuendo -- which goes well beyond what any court has been willing to consider.

Even assuming the constitutionality of the guidelines in question, the School District acted impermissibly in punishing speech from which no substantial disruption resulted. The District confuses the boisterous nature of high school students

with a threat to the maintenance of order in the educational process. It further incorrectly asserts that the slight unconventionality of Fraser's speech is on its own disruptive without any further showing. Arguments presented by the District that its duty to "inculcate community standards of decency" overwhelms all First Amendment considerations are without merit, as are the District's assertions that Fraser's speech was somehow intrusive and harmful to students.

Finally, the District abridged Fraser's rights with an appeals process that offered insufficient right to be heard and a system of punishment which discriminatorily singled out Fraser while ignoring similar "transgressions."

ARGUMENT

I. FORUMS FOR STUDENT EXPRESSION IN PUBLIC SCHOOLS ENJOY BROAD PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

This Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property or facilities to some intended purpose outweighs the interest of those wishing to use it for other purposes. *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 105 S. Ct. 3439, 3448 (1985). "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 3449.

Moreover, the Court has also ruled that if the state establishes a "public forum," then the state cannot censor the expression which takes place in that forum. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). If, for example, a city were to allow plays, speeches and meetings at a civic auditorium, that auditorium would be a "public forum," and the city would violate the Constitution if it were to deny use of the auditorium for the production of a play solely because it would offend the sensibilities of city officials. *Id.* The same principle has been used to recognize as public forums city parks, school auditoriums and airports and to guarantee that such groups as the Hare Krishnas or the Nazi Party have the right to engage in expressive

activities in those forums free of government censorship. *National Socialist White People's Party* v. *Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Fernandes* v. *Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979), *modified*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Collin* v. *Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

Further, this Court has consistently and unambiguously stated that restraints on expression are among the most disfavored acts in our constitutional system. *See, e.g., Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). This is no less true in our nation's public schools. Over fifteen years ago, the U.S. Supreme Court first explicitly recognized that public school students enjoy First Amendment protections. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Since *Tinker*, the Court has handed down several decisions dealing with the free speech rights of students. While all of the cases dealt with college students, the rules announced are equally applicable in the high school setting. In *Healy* v. *James*, 408 U.S. 169 (1972), the Court held that a college could not refuse to recognize the group merely because it disagreed with the group's philosophy or because it had an undocumented fear of a disruption. In *Papish* v. *Board of Curators of University of Missouri*, 410 U.S. 667 (1973), decided a year later, a college student was expelled for distributing a highly offensive newspaper on campus. The paper carried a political cartoon which depicted policemen raping the Statue of Liberty and the Goddess of Justice and a

headline announcing: "Motherfucker Acquitted." In concluding that the expulsion violated Papish's First Amendment rights, the Court held that the newspaper was not "obscene," was not likely to cause a disruption of the school and therefore could not be censored. And in a 1981 case, *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court held that a state university policy prohibiting the use of otherwise generally available school facilities for religious workshops or religious teaching violates students' rights to freedom of speech and association.

Many other courts have recognized the existence of forums in public schools and thus applied strong limitations to the censoring activity of school officials. As these courts have recognized, a determination of student activity as curricular or extracurricular, school-sponsored or student-sponsored, is irrelevant if a forum is found to exist. Labeling an outlet for student expression as an "instructional tool" will not allow school administrators unbridled control when a forum has in fact been created. *Trujillo* v. *Love*, 322 F. Supp. 1266, 1268 (D. Colo. 1971). "The state is not necessarily the unrestrained master of what it creates and fosters." *Antonelli* v. *Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970). When a school gives students an unrestrained opportunity to speak to a relevant public on issues that concern them, even though it may occur on school grounds for school credit and involve the use of school funds and facilities, the school has clearly created a free speech forum for student expression that can be controlled only according to constitutional dictates. *Bazaar* v. *Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Stanton* v. *Brunswick*

School Department, 577 F. Supp. 1560 (D. Me. 1984); *Reineke* v. *Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975); *Lee* v. *Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

After more than 15 years, *Tinker* remains the dispositive statement on student free speech rights. In *Tinker*, this Court stated that students "are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect. . . . 393 U.S. at 511. Absent a showing of "material and substantial interference with schoolwork or discipline," schools cannot restrain the full First Amendment rights of their students. *Id.* This holding flows directly from *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where this Court stated that:

> "[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

II. THE BETHEL SCHOOL DISTRICT UNCONSTITUTIONALLY PUNISHED PROTECTED SPEECH

A. The Student Candidate Assembly Was A Forum for Student Expression

Bethel High School administrators had clearly created a forum for student expression in the student government candidate assembly. The activity was student-organized and involved only student speakers. RT at 52; *Fraser* v. *Bethel School District No. 403*, 755 F.2d at 1364. Although Fraser chose to present his speech to three teachers for comment, RT at 52, Complaint para. 10, the school clearly did not require such approval. In the same assembly a year earlier, a student gave a speech that contained sexual innuendo and four-letter words. RT at 52. Unlike the situation at issue in *Seyfried* v. *Walton*, 668 F.2d 214 (3d Cir. 1981) (high school dramatic performance rejected by school officials because of its sexual content), students at Bethel High School were given complete authority to write and deliver their own speeches. *Seyfried* found no violation of student First Amendment rights because it did not involve a forum for student expression. The dramatic performance to which school administrators objected in that case was selected by teachers, without student participation. Similarly, the decision of this Court in *Board of Education, Island Trees Union Free School District* v. *Pico*, 457 U.S. 853 (1982), involved only the removal by high school officials of books from library shelves, not their censorship of a forum for student expression.

As the Court of Appeals in this case noted, it is to the credit of Bethel High School officials that they created an open forum for students to express their political views. "[W]hen they did so they implicated the fundamental right of participation in the process of self-government, albeit student government." *Fraser* 755 F.2d at 1365. Once the school had created such a forum for student expression, it "assumed an obligation" to justify its censoring actions "under applicable constitutional norms." *Widmar* v. *Vincent*, 454 U.S. 263, 267 (1981).

B. Forums for Student Expression May Not be Abridged Absent Extreme Conditions

Freedom of speech and freedom of the press are not absolute rights, but this Court and other courts have made clear that schools may not freely trample these rights by disregarding the clear body of the law in the area. As this Court in *Tinker* recognized, students are not accorded First Amendment rights coextensive with those of adults. *Baughman* v. *Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973). However, even considering the particular characteristics of the high school environment, the Court in *Tinker* announced that it would allow restriction only of that student expression which "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school. . . ." *Tinker*, 303 U.S. at 509, *citing Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). Nor did this Court weaken high school students' First Amendment rights in *New Jersey* v. *T.L.O.*, ___ U.S. ___, 105 S.Ct. 733 (1985). Petitioners misinterpret this decision, and rely on it as their sole support for the proposition that schools may abridge student constitutional rights. *T.L.O.* specifically stated that it did not apply to cases involving student expression. *Id.* at 741.

This Court has recognized nine broad categories of unprotected speech: obscenity, *Miller* v. *California*, 413 U.S. 15 (1973); defamation, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); incitement to imminent lawless activity, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); fighting words, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); invasion of privacy, *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); advertisements for illegal products or services, *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); copyright violations, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); matters involving national security, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); and speech that materially and substantially disrupts school activities, *Tinker*, at 509.

As discussed in Section IV, *infra*, petitioner asserts only that the last of these categories of speech occurred in the incident at bar, and additionally claims the existence of a new form of unprotected speech: sexual innuendo. Case law makes clear that the latter is an insufficient reason for punishing speech, and the former in fact did not occur here.

Restricting and punishing free speech in a forum for student expression is permissible only in extreme conditions. Petitioners do not show such circumstances existed here, nor do cases cited by petitioner justify their extraordinary actions. *Board of Education, Island Trees Union Free School District* v. *Pico*, 457 U.S. 853 (1982), did not involve

student speech at all. *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), involved the heavily-regulated broadcast industry and audiences inadvertently exposed to radio programs. *Nicholson* v. *Board of Education Torrance Unified School District*, 682 F.2d 858 (9th Cir. 1982), cited throughout this litigation, was distinguished in the instant case by the very court which rendered the *Nicholson* decision.

Most importantly, courts have refused to assess the content of the speech in question until the constitutional validity of the school regulations can be established. *Baughman* v. *Freienmuth*, 478 F.2d 1345, 1347 (4th Cir. 1973); *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971). Student speech, whether inside or outside a public forum, can only be limited when appropriate due process is afforded. *Gambino* v. *Fairfax County School Board*, 429 F. Supp. at 737 (E.D. Va. 1977); *Nitzberg* v. *Parks*, 525 F.2d 378, 383 (4th Cir. 1975). As discussed in the next section, the guidelines of petitioner Bethel School District lack constitutional validity, and thus the extreme conditions prerequisite to censorship do not exist.

III. THE BETHEL SCHOOL DISTRICT GUIDELINES ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND THUS COULD NOT BE USED TO SILENCE A FORUM

Regulations in high schools limiting freedom of expression, if they are to exist at all, must meet certain minimal requirements. For official guidelines to be constitutionally sufficient, they must clearly set out what is forbidden; but other due process limitations also must be incorporated into any administrative regulations before they will be approved. The case law has developed minimal constitutional requirements before student publications can be censored, requirements equally appropriate for student speech in a public forum.[1]

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[1] The term "minimal" does not imply that it is easy to satisfy these standards; to date, guidelines challenged in court are overwhelmingly found violative of the required constitutional tests. *Nitzberg* v. *Parks*, 525 F.2d 378 (4th Cir. 1975); *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972); *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Quarterman* v. *Byrd*, 453 F.2d 54 (4th Cir. 1971); *Hernandez* v. *Hanson*, 430 F. Supp. 1154 (D. Neb. 1977); *Leibner* v. *Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977); *Pliscou* v. *Holtville Unified School District*, 411 F. Supp. 842 (S.D. Cal. 1976); *Cintron* v. *State Board of Education*, 384 F. Supp. 674 (D.P.R. 1974); *Jacobs* v. *Board of School Commissioners*, 349 F. Supp. 605 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); *Poxon* v. *Board of Education*, 341 F. Supp. 256

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First, regulations must offer criteria and specific examples so that students will understand what expression is proscribed. *Nitzberg* v. *Parks*, 525 F.2d at 383 (4th Cir. 1975); *Baughman* v. *Freienmuth*, 478 F.2d at 1349 (4th Cir. 1973); *Shanley* v. *Northeast Independent School District*, 462 F.2d at 976 (5th Cir. 1972).

Second, the regulations must detail the criteria by which an administrator might reasonably predict the occurrence of "substantial disruption." *Nitzberg* v. *Parks*, 525 F.2d at 383 (4th Cir. 1975).

Third, the regulations must provide definitions of all key terms used, such as "obscenity," "disruption," "distribution" and "defamatory." *Hall* v. *Board of School Commissioners of Mobile County Alabama*, 681 F.2d 965, 971 (5th Cir. 1982); *Nitzberg* v. *Parks*, 525 F.2d at 383 (4th Cir. 1975); *Shanley* v. *Northeast Independent School District*, 462 F.2d at 977 (5th Cir. 1972).

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(E.D. Cal. 1971). *But see, Williams* v. *Spencer*, 622 F.2d 1200 (4th Cir. 1980). Supreme Court decisions indicate that the Fourth Circuit applied a standard for vagueness in *Williams* that is much too strict. "The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Bigelow* v. *Virginia*, 421 U.S. 809, 815-16 (1975). "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

Finally, procedural due process requires that the regulations must be included in the official school publication or circulated to students in the same manner as other official material. *Nitzberg* v. *Parks*, 525 F.2d at 383 (4th Cir. 1975).

School rules which the courts have declared unconstitutionally vague or overbroad include a requirement that student publications conform to "the journalistic standards of accuracy, taste and decency maintained by the newspapers of general circulation in the city," *Leibner* v. *Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977); a rule banning literature which is "alien to school purposes," *Cintron* v. *State Board of Education*, 384 F. Supp. 674 (D.P.R. 1974); a prohibition on literature which "advocates illegal actions, or is grossly insulting to any group or individual," *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); a ban on literature which "incites students or disrupts the orderly operation of the school," *Peterson* v. *Board of Education of School District No. 1*, 370 F. Supp. 1208 (D. Neb. 1973); a rule prohibiting literature that is "either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools or injuries to others," *Jacobs* v. *Board of School Commissioners*, 349 F. Supp. 605 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); a prohibition of "libelous" material without adequate definition, *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); a prohibition of "obscene" material without adequate definition, *Id.*; and a rule requiring the prior approval of all literature that is "political," "sectarian," or "of special interest," *Hall* v. *Board of*

School Commissioners of Mobile County, Alabama, 681 F.2d 965 (5th Cir. 1982).

Fraser was charged with violating the school's disruptive conduct rule, which states that "Conduct which materially and substantially interferes with the eductional process is prohibited, including the use of obscene, profane language or gestures." The regulation is clearly deficient, and cases cited by petitioners in urging wide discretion be granted schools to regulate discipline do not diminish the right to protected speech in public forums. Petition for Writ of Certiorari at 21. The regulation fails to define any of its key terms, such as "obscene," "profane" or "materially and substantially interferes," in ways which would give guidance to a high school student. No examples of what might be disruptive, obscene or profane are given. There are no criteria for an administrator to use in reaching a prediction that disruption has or will occur. And, as discussed in Section IV, *infra*, procedural requirements are virtually non-existent.

Further, as both the trial court and court of appeals concluded, the disruptive conduct rule is overbroad and on its face threatens constitutionally protected speech. The rule prohibits the use of "profane language," and the Ninth Circuit found that, read as a whole, it would "permit a student to be disciplined for using speech considered to be 'indecent' even when engaged in extra-curricular activity." *Fraser*, 755 F.2d at 1365 n.12. Petitioner agrees that the rule must be read to allow it to "regulate student speech deemed indecent." Petition for Writ of Certiorari at 14. None of the cases cited by petitioner, however, establish any authority for prohibiting "indecent" speech or equating such speech, regardless of

setting or circumstance, with "conduct which materially and substantially interferes with the educational process." *Tinker*, 393 U.S. at 509.

In *Papish* v. *Board of Curators of University of Missouri*, 410 U.S. 667 (1973), this Court specifically declined to allow the regulation of student speech based upon offensiveness or "conventions of decency," 410 U.S. at 670, and found that a student publication that contained profanity but that was not obscene was constitutionally protected speech. Since *Papish*, several lower courts have found that non-obscene speech made by high school students which contains profanity or sexual references is similarly protected and cannot be automatically presumed disruptive. *Jacobs* v. *Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); *Scoville* v. *Board of Education of Joilet*, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); *Koppell* v. *Levine*, 347 F. Supp. 456 (E.D.N.Y. 1972). As the court noted in *Jacobs*, an audience of high school students does not preclude the protection of speech which may be "far from obscene in the legal sense" and not demonstrably disruptive. 490 F.2d at 610.

These cases suggest that even student speech containing profanity merits protection and cannot be prohibited under all circumstances simply because it is distasteful to school administrators. As this Court noted in *Cohen* v. *California*, 403 U.S. 15, 26 (1971), the use of profane words, while not necessarily adding to the cognitive component of expression, may enhance the communication of the emotions that give the expression force.

Even assuming arguendo, however, that profanity used by high school students could be the subject of a total prohibition by school administrators, it is evident that the Bethel disruptive conduct rule goes well beyond prohibiting its use. The rule applies to "indecent" speech regardless of whether such speech contains profanity or is obscene. Even the principal case upon which petitioners rely in support of their discretionary authority to insulate the students under their protection from contact with offensive speech does not sanction so broad an encroachment on First Amendment rights. In *FCC* v. *Pacifica*, 438 U.S. 726 (1978), this Court upheld as constitutional a Federal Communications Commission order finding that a radio broadcast, which made repeated use of profanity in a patently offensive way designed to shock the listener, fell within the F.C.C.'s power to regulate "indecent" speech and could be "channeled" to air at times when unsupervised children would not hear it. Among the many reasons that petitioners' reliance on *Pacifica* is inapposite is the fact that the indecent speech there in question was explicitly profane, not merely capable of an "indecent" or sexually suggestive interpretation as was Fraser's speech. *Pacifica* involved inadvertent listeners, not high school students voluntarily choosing to attend a student assembly from which they could leave at their will. Finally, *Pacifica* only dealt with the highly regulated broadcast media, not a forum for expression of a student speech assembly. This Court there took care to emphasize the narrowness of its *Pacifica* holding and the fact that it did not contemplate sanctions for telecasts "of an Elizabethan comedy" or Chaucer's Miller's Tale. 438 U.S. at 750, n.29. Like some of the more ribald passages in works such as these, the speech that Bethel School district found

indecent and violative of its rules in the instant case was essentially an attempt to use a sexual metaphor in order to more effectively convey an idea. The rule prohibiting the use of such metaphor is overbroad; no case ever has permitted such a level of outright censorship.

Because the Bethel School District guidelines fail to comport with the most minimal of constitutional requirements, they were found inoperable by the district court and the court of appeals. Guidelines which fail to meet the constitutional requirements may not be used as the basis for restricting student speech in a public forum. For this reason, the decision below should be upheld.

IV. THE APPLICATION OF THE BETHEL SCHOOL DISTRICT POLICY WAS UNCONSTITUTIONAL

A. No Material and Substantial Disruption of the School Environment Resulted from Fraser's Speech

As this Court has determined, the special circumstances of the school environment allow school officials to censor student speech when they can reasonably demonstrate or forecast a "material and substantial" disruption of school activity. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). No such disruption was reasonably predicted by Bethel High School officials and no such disruption in fact occurred as a result of Fraser's speech.

Censors basing their acts upon the substantial disruption theory must "be able to show that

[their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The school authority's action cannot be the result of an "undifferentiated fear" of a disruption. *Id.* at 508. Courts have said that neither a "mild curiosity" by students nor an administrator's belief that a particular expression "could" or "might" cause a disruption is sufficient, *Vail* v. *Board of Education*, 354 F. Supp. 592 (D.N.H.), *vacated and remanded*, 502 F.2d 1159 (lst Cir. 1973), and a school official's "intuition" is not enough. *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). In short, to justify suppression of student expression, an administrator needs demonstrable facts. To meet the substantial disruption standard, far more is required than petitioners allege occurred in the instant case.

Petitioners presented evidence that some students reacted by "hooting and yelling" during Fraser's speech. RT at 37; *Fraser*, 755 F.2d at 1359. However, a school counselor testified that the noises he heard were similar to those heard at other assemblies held at the school. RT at 37; *Fraser*, 755 F.2d at 1359.

The counselor also testified that three students out of the approximately 600 present made motions simulating sexual activity during the speech. RT at 37; *Fraser*, 755 F.2d at 1359. Yet as the court of appeals noted, the school officials made no claim that they had difficulty maintaining order during the assembly or that Fraser's speech delayed the assembly or the school day. *Fraser*, 755 F.2d at 1360. School officials in fact took no action to discipline the three students directly involved in the activity to which the

officials objected. *See Sullivan* v. *Houston Independent School District (Sullivan I)*, 307 F. Supp. 1328, 1342 (S.D. Tex. 1969).

The district court found that on the day after the assembly one teacher decided that students in her class were "more interested in discussing the speech than attending to class work." The teacher then "*invited* a class discussion of the speech," which lasted 10 minutes. Finding of Fact #5 (emphasis added). No evidence indicated that any material and substantial disruption of the class occurred. Evidence of an invited discussion on a topic in which students expressed an interest can hardly be claimed as "establishment of substantial fact, to buttress the determination" of substantial disruption. *Butts* v. *Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971). Repeated disruptions of class lectures by students who wanted to discuss the student expression that administrators had condemned has been seen as not satisfying the *Tinker* standard. *Sullivan* v. *Houston Independent School District (Sullivan I)*, 307 F. Supp. at 1334, 1342 (S.D. Tex. 1969). None of petitioners' evidence suggests that Fraser's speech materially disrupted classwork or involved substantial disorder or invaded the rights of others as *Tinker* requires. 393 U.S. at 513.

Not only has the school failed to present evidence of disruption in fact, but its assertion that "inappropriate" language in itself can be disruptive is clearly contradicted. In *Papish* v. *Board of Curators of University of Missouri*, 410 U.S. 667, 670 n.6 (1973), this Court found no disruption inherent in the use of the words "Motherfucker Acquitted" in a college newspaper. Similarly in *Antonelli* v. *Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970), the court

recognized that the use of four-letter words in a campus newspaper "is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process." Even in the high school environment, the use of "coarse language" has been recognized as creating "little, if any, disruption of normal school activities -- let alone the 'material and substantial' disruption" required by *Tinker*. *Sullivan* v. *Houston Independent School District (Sullivan II)*, 475 F.2d 1071, 1075 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973). The mild words used by Fraser do not even approach the level of unconventionality of language that has been found non-disruptive in other cases.

Neither can the school establish that the *Tinker* standard was met by the alleged "sexually harassing" nature of Fraser's speech. RT 94-100. The testimony of one witness that the speech was sexist does not satisfy the requirement that the expression be of a kind that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. A blanket conclusion that sexually oriented speech is inherently disruptive of the school environment can no more pass constitutional muster than could a similar claim regarding racially offensive material. *See Leibner* v. *Sharbaugh*, 429 F. Supp. 744, 749 (E.D. Va. 1977).

In *Trachtman* v. *Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), which petitioners cite as relevant, the court relied on the expert testimony of four witnesses who asserted that "significant psychological harm" would result from students being questioned about intimate details of their sexuality. The facts in this case are clearly distinguishable. Fraser's speech satisfies no claim of "sig-

nificant psychological harm" and involves no intrusive questioning about students' personal lives.

The evidence indicates that the school officials' decision to punish Fraser was clearly based not on any acceptable grounds, but on precisely the desire to avoid "discomfort and unpleasantness." *Tinker*, 393 U.S. at 509. The punishment was their effort to condemn and supress "expressions of feelings with which they do not wish to contend." *Id.* at 511 (quoting *Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

As with *Tinker*, where the school authorities indicated that their objection was not so much to the expression of the students itself but rather to their decision to express themselves by wearing black armbands to school instead of making their protest through the ballot box, Fraser was punished as much for the form of his message as for the content. *Tinker*, 393 U.S. at 509 n.3. Clearly the message of political expression and the means for expressing that message are often so integrally tied as to be inseparable. Fraser perhaps could have made a speech that avoided the use of sexual puns, but the reaction of the audience and the success of his candidate is at least some indication that Fraser's choice of words was an especially effective method of achieving the political goal he sought. Attempted control of the words and connotations used in delivery of otherwise protected expression is no less censorship than outright banning of the message behind those words and connotations.

In sum, petitioners presented no evidence that the *Tinker* standard has been met.

B. Fraser's Speech Was Not Obscene

Although the petitioners' disruptive conduct rule refers to "obscene language," the petitioners' do not contend that Fraser's speech in this case was obscene within the meaning of the decisions of this Court, and, as discussed in Section III, *supra*, the clause of the rule banning profanity is unconstitutional on its face. The proper test for obscenity in the high school context is developed by this Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973), and *Ginsberg* v. *New York*, 390 U.S. 629 (1968). *Miller* limits the scope of the obscenity exception to works "which depict or describe sexual conduct" and "which taken as a whole appeal to the prurient interest in sex, which portray, sexual conduct in a patently offensive way and which taken as a whole, do not have serious literary, artistic, political or scientific value." 413 U.S. at 24. *Ginsberg* applies a variable obscenity concept designed to respect the differences in maturity between adults and minors while still retaining the distinction between speech designed to appeal to the prurient interest and speech not so designed. *Id.* at 635-37. Fraser's speech in the instant case was designed primarily not to titilate but rather to focus attention on his chosen candidate in the student election. Finding of Fact No. 4. The sexual metaphors he employed for the sake of humor were not significantly erotic and do not fulfill the *Miller* definition of obscenity.

Fraser's speech, therefore, provides no constitutional basis for restraint.

C. Fraser's Suspension Constituted a Violation of His Right to Due Process and Equal Protection of the Law As Guaranteed by the Fourteenth Amendment

Immediately after petitioner Assistant Principal Ingle announced Fraser's punishment, Fraser indicated that he wished to appeal her decision. Because the principal was not present at Bethel High School that day, Ingle stated that she would rule on the immediate appeal. Ingle promptly denied the appeal. Complaint at para. 24.

As this Court has recognized, "[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." *Goss* v. *Lopez*, 419 U.S. 565, 576 (1975). When the fundamental right to free expression is at issue, an appeal procedure may not be a sham. Ingle's imposition of punishment and immediate denial of a first level appeal was a clear violation of Fraser's due process rights.

In addition, the punishment of Fraser for his speech when other students expressing similar messages had gone unpunished is a clear violation of his right to equal protection under the law. Only one year earlier, another student gave a speech with secondary meanings of a sexual nature and received no suspension. RT at 52; Complaint at para. 23. Yet another student had published an essay in a school publication that described the sexual conquest of a female by a male in terms of a military action and

received no punishment. Complaint at para. 22. Also, the three students who were seen during Fraser's speech making movements simulating masturbation and sexual intercourse were neither reprimanded nor suspended.

The clear implication is that Fraser alone was singled out for punishment because of his history as an outspoken critic of the school and its administration through oral comments and editorials in the student newspaper. Complaint at paras. 16 and 18. Such unequal enforcement of a rule by a state actor cannot be tolerated. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

CONCLUSION

As this Court stated in *Tinker*:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

For the foregoing reasons, the judgment of the court below should be upheld.

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